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No. 8, Original

IN THE

Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

v.

STATE OF CALIFORNIA, *et al.*,

Defendants.

EXCEPTION BY STATE PARTIES TO REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

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December 20, 1999

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF EXCEPTION 1

BRIEF IN SUPPORT OF EXCEPTION 3

I. INTRODUCTION 3

II. BACKGROUND OF THE DISPUTE 4

A. The 1893 Agreement 4

B. The Proceedings in *Arizona I* (*Arizona v. California*, 373 U.S. 546 (1963), 376 U.S. 340 (1964) (Decree)) 6

C. The 1979 Supplemental Decree (*Arizona v. California*, 439 U.S. 419 (1979)) 10

D. The Proceedings Before the Secretary of the Interior Regarding the Disputed FYIR Boundary Lands 12

E. The Proceedings in *Arizona II* (*Arizona v. California*, 460 U.S. 605 (1983), 466 U.S. 144 (1984) (Decree)) 14

F. The Current Proceedings ("*Arizona III*") . 16

III. ARGUMENT 19

TABLE OF CONTENTS--Continued

Page

A. The Court's Preclusion Rationale Concerning "Omitted Lands" in *Arizona II* is Equally Applicable to the FYIR "Boundary Lands" Claim 19

B. The State Parties Did Not Waive Their Right to Raise a Preclusion Defense 21

1. The 1979 Supplemental Decree ... 21

2. The background of the 1984 Supplemental Decree in *Arizona II* confirms the State Parties' construction of the 1979 decree 22

C. The State Parties' Preclusion Defense is Not Untimely 24

D. The Special Master Erred in Treating the 1978 Solicitor's Opinion as an Unforeseeable "Unknown Circumstance" Negating a Preclusion Defense 26

IV. CONCLUSION 27

TABLE OF AUTHORITIES

CASES **Page**

Arizona v. California, 373 U.S. 546 (1963) . 1,3,6,7,10,17,20

Arizona v. California, 376 U.S. 340 (1964) ..... *passim*

Arizona v. California, 439 U.S. 419 (1979) ..... *passim*

Arizona v. California, 460 U.S. 605 (1983) ..... *passim*

Arizona v. California, 466 U.S. 144 (1984) 14,15,22,24

Armstrong v. Norwest Bank, 964 F.2d 797 (8th Cir. 1992) 27

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 25

Clements v. Airport Authority of Washoe County, 69 F.3d 321 (9th Cir. 1995) 25

Lesher v. Lavrich, 784 F.2d 193 (6th Cir. 1986) 25

Lujan v. U.S. Department of the Interior, 673 F.2d 1165, (10th Cir.), *cert. den.*, 459 U.S. 969 (1982), *reh'g den.*, 459 U.S. 1229 (1983) 25

Nevada v. United States, 463 U.S. 110 (1983) 16,19,20

Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) ... 25

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 25

TABLE OF AUTHORITIES--Continued

Page

Quechan Tribe of the Fort Yuma Reservation, California v. United States (Ind. Cl. Comm. Docket No. 320) 6

Salahuddin v. Jones, 992 F.2d 447 (2d Cir. 1993) 25

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 5

STATUTES, LEGISLATIVE MATERIALS AND REGULATIONS

Act of March 3, 1893, 27 Stat. 612 4

Act of August 15, 1894, 28 Stat. 286, 322 5,6,27

Quechan Indian Reservation Boundaries; Secretarial Determination and Directives, 46 Fed. Reg. 11372 (1981) 13

Hearings on Oversight on Quechan Land Issue Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess. (1976) 6,9,12,13

MISCELLANEOUS

Report of Special Master Simon H. Rifkind (December 5, 1960) 10

TABLE OF AUTHORITIES--Continued

Page

Report of Special Master Elbert P. Tuttle (February 22, 1982) 15

Solicitor's Opinion M-28198 (1936) 6,7,9,12,13,17,20

Solicitor's Memorandum Opinion (June 12, 1968) 12,13

Solicitor's Opinion M-36886, 84 I.D. 1 (1977) 4,13

Solicitor's Opinion (December 20, 1978) 86 I.D. 3 13,26

Transcript of Proceedings in *Arizona v. California*, 373 U.S. 546 (1963) 7,8,9

FRCP Rules 8(c), 12(b) and 15 24

Supreme Court Rule 17 24

Moore's Federal Practice, §131.21 (3rd Ed. 1998) 26

Wright, Miller & Cooper, *Federal Practice and Procedure*, §4407 (1981) 27

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STATE PARTIES' STATEMENT OF EXCEPTION TO REPORT OF SPECIAL MASTER

The State of Arizona, the State of California, Coachella Valley Water District, and The Metropolitan Water District of Southern California (hereafter "State Parties") submit this exception to that portion of the Report of Special Master Frank McGarr dated July 28, 1999, *i.e.*, Memorandum Opinion and Order No. 4 (September 6, 1991) (Rep. App. 2A) at pages 6-7, which rejects the State Parties' contention that the claims of the United States and Quechan Indian Tribe for water rights for certain disputed "boundary lands" allegedly part of the Fort Yuma ("Quechan") Indian Reservation, but not claimed in *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), may not be asserted in this proceeding because of the "finality

principles" applied by this Court in rejecting similar "omitted lands" claims in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"). The grounds for this exception are set forth in the following supporting brief.

STATE PARTIES' BRIEF IN SUPPORT OF EXCEPTION

I. INTRODUCTION

This dispute involves the questions of (1) whether some 25,000 acres of land in the vicinity of the Fort Yuma ("Quechan") Indian Reservation ("FYIR") in California ("disputed boundary lands") are part of that reservation[1] and (2) if so, whether approximately 52,000 acre feet of additional reserved water rights should be allocated annually to the FYIR for those lands beyond those awarded by the decision and decree in *Arizona v. California*, 373 U.S. 546 (1963), 376 U.S. 340 (1964) ("*Arizona I*"), all of which would be senior to the rights of other California non-Indian holders of contractual Colorado River water rights, such as Coachella Valley Water District and The Metropolitan Water District of Southern California. The issue before the Court is whether the United States and the Quechan Indian Tribe ("Tribe") should be precluded from claiming additional water rights on either of two grounds: (1) no water rights claim was made for the disputed boundary lands by the United States in *Arizona I* and

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[1]The underlying issue is whether the cession of the disputed lands by the Quechan Tribe to the United States in an 1893 agreement ratified by Congress in 1894 never became effective because of the Government's alleged failure to perform some of its obligations, as the United States and the Tribe contend, or whether the cession was immediately effective and the Tribe was relegated to a breach of contract/trust claim against the United States for the alleged failure to perform, as the State Parties contend. Because the Special Master found for the State Parties on their defense of the preclusive effect of a 1983 Court of Claims judgment, he did not take evidence or make findings and conclusions regarding this issue and it is not now before the Court. Further proceedings before the Special Master will be required in the event that neither of the grounds for the State Parties' preclusion defense are sustained.

is now barred by the "finality principles" applied by this Court to a similar claim for "omitted lands" in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"); and (2) the Tribe received $15 million in compensation from the United States for the taking of the disputed lands under a 1983 judgment of the Court of Claims. The Special Master held that the United States' and Tribe's claim was not precluded on the first ground, but was precluded on the second. The State Parties except to his ruling on the first ground.

II. BACKGROUND OF THE DISPUTE

A. The 1893 Agreement[2]

An executive order of January 9, 1884, established the Fort Yuma Indian Reservation in California for the Yuma (Quechan) Indians. By the Act of March 3, 1893, 27 Stat. 612, 633, Congress authorized the Secretary of the Interior ("Secretary") "to negotiate with any Indians for the surrender of portions of their respective reservations, any resulting agreement being subject to ratification by Congress." Later that year the Quechan Tribe petitioned the President and Congress to have their lands irrigated and offered to cede their rights in the reservation to the United States for settlement by non-Indians in return for allotments of irrigable land to individual Indians.

The Secretary appointed a commission which executed an agreement with the Tribe on December 4, 1893 ("1893 Agreement"). Article I of the 1893 Agreement provided that the Quechans "upon the conditions hereinafter expressed, do

[2]This background information is taken generally from Solicitor's Opinion M-36886, 84 I.D. ("Interior Decisions") 1 (1977) ("Austin Opinion").

hereby surrender and relinquish to the United States, all their right, title, claim and interest in and to and over" the Yuma Reservation. The remainder of the agreement set forth the obligations of the United States.[3] The 1893 Agreement was "accepted, ratified and confirmed" by Congress in section 17 of the Act of August 15, 1894, 28 Stat. 286, 332 ("1894 Act"). The 1894 Act also required the Colorado River Irrigation Company, which had been granted a right-of-way the previous year, to begin construction of an irrigation canal within three years or forfeit the right-of-way. It also provided that "all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws." *Id.* at 336.

The irrigation company never constructed the proposed canal. However, in 1904 Congress authorized the Secretary to serve the Quechan irrigable lands as a part of any reclamation project for that area. 33 Stat. 189, 224. Initial diversion and distribution works were completed by 1904 and water was delivered to the unallotted Quechan irrigable lands in 1910. Disposal of those lands began in that year. In 1911 Congress increased the allotment to individual Indians from 5 to 10 acres. 36 Stat. 1059, 1063. In 1912, 8,110 acres in the western part of the irrigable area were allotted to the Quechans. The distribution system for that area was substantially completed by 1915 and water deliveries began a few years later. The non-irrigable lands have never been opened to settlement and sale.

[3]If the Government's obligations represent " 'an unconditional commitment from Congress to compensate the Indian tribe for its opened land,' a 'nearly conclusive' or 'almost insurmountable' presumption of diminishment arises." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998).

As a result of a dispute over the status of the non-irrigable lands between the Bureau of Reclamation and the Bureau of Indian Affairs in 1935, Secretary Ickes requested an opinion on the matter from his Solicitor. On January 8, 1936, Solicitor Margold held that the 1893 Agreement, as ratified by the 1894 Act, extinguished the Tribe's title to certain non-irrigable lands, which are the lands currently in dispute.[4] In 1951 the Tribe filed a "Petition for Loss of Reservation" with the Indian Claims Commission asserting a claim for money damages arising "from the expropriation by the United States of the greater part "of the Tribe's 1884 reservation (p. 3, ¶6), which claim included the disputed boundary lands. *Quechan Tribe of the Fort Yuma Reservation, California v. United States* (Docket No. 320).[5]

B. The Proceedings in *Arizona I* (*Arizona v. California*, 373 U.S. 546 (1963), 376 U.S. 340 (1964) (Decree))[6]

In 1952 Arizona filed a complaint with this Court to determine the respective rights of Arizona and California to the waters of the Lower Colorado River Basin. The United States intervened and asserted water rights for the Fort Yuma and

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[4]Solicitor's Opinion M-28198 (January 8, 1936) ("Margold Opinion"). The opinion is set out in *Hearings on Oversight on Quechan Land Issue Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 94th Cong., 2d Sess. 69 (1976) (hereafter "*Quechan Hearings*").

[5]The Tribe's petition is included in a group of Claims Court documents which accompanied the "Brief for State Parties on Pretrial Issues" (April 15, 1991) before the Special Master.

[6]The proceedings in *Arizona I* are summarized in *Arizona II*, 460 U.S. at 607-11.

other Indian reservations. It claimed enough unappropriated water to meet the "reasonable needs" of the Indians of each reservation measured by the water requirements of the "practicably irrigable acreage" within each reservation and with priorities dating from the creation of each reservation. This measurement standard necessarily made the accurate determination of each reservation's boundaries an important threshold issue. The United States introduced maps for each reservation showing its boundaries and the location of historically irrigated acreage plus lands that were considered to be "practicably irrigable." The maps of the FYIR conformed with official maps of the reservation reflecting the boundaries as determined by the 1936 Margold Opinion.

Counsel for the United States (Mr. Warner) made it clear, in response to questioning by Special Master Simon Rifkind, that the maps evidenced the United States' *maximum* claim for each reservation (*Arizona I* Tr. 12,461, 14,153-54):

> THE MASTER: I take it from what you have just said that you are going to assert a claim for the maximum amount of water necessary for the irrigable acres in the reservation.
>
> MR. WARNER: That is correct, Your Honor.
>
> * * *
>
> MR. ELY [Counsel for California]: . . . What I am now trying to find out is whether we may rely upon these lands on these maps as limiting that claim or not.
>
> THE MASTER: Is this a Bill of Particulars of that claim, is what you want to know?

MR. ELY: Yes, sir.

* * *

THE MASTER: Is it, Mr. Warner?

MR. WARNER: The testimony--

THE MASTER: No; the maps.

MR. WARNER: --as reflected by these maps and by the other testimony will define the maximum claim which the United States is asserting in this case.

The Special Master had earlier admonished Mr. Warner as to the possible preclusive effect of not asserting and proving all possible federal claims (*id.* at 11,282, 11283-84 (emphasis added)):

> THE MASTER: You see, when you quiet title, that is precisely what you do. You enter a decree against the world, and that is the peculiarity of an action to quiet title, which I understand you invoked. You said that you were a plaintiff in this court, asking the Court to quiet your title to 28 reservation claims, and so forth. In an action or a decree quieting title, you cut out all claims not asserted. That is precisely the point; and therefore, it is not easy to accept your suggestion that it is not the function of the Court to reject all claims not asserted.
>
> * * *

> *I just want you to be aware of the fact that the mere fact that it has not been asserted does not mean that you may not lose it*, because the decree here is supposed to dispose of all of the waters, and all of the claims thereto of the river and all its tributaries. That is what the ideal function of this decree would be. I don't know whether it will succeed in that, but that is what we are supposed to be aiming for in an action to quiet title.

Mr. Warner subsequently assured the Special Master that "I think it is our duty to prove the Indian claims to the full extent we can prove them." *Id.* at 12564.

The Government's understanding that the 1936 Margold Opinion was a controlling determination of the reservation boundary was reflected in its proposed findings and conclusions for the FYIR, which described the 1893 Agreement as follows:[7]

> On December 4, 1893, an agreement was entered into between the United States and the Yuma Indians by which said Indians surrendered to the United States all their right, title, claim and interest in the Reservation established by Executive Order of January 9, 1884, for them and such other Indians as the Secretary might see fit to settle thereon.

No existing or potential boundary issues on the FYIR were called to the Special Master's attention.

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[7]Findings of Fact and Conclusions of Law Proposed by the United States of America (April 1, 1959) Finding 4.8.3, p. 83, quoted in *Quechan Hearings*, n. 4 *supra* at 190.

Special Master Rifkind's report recommended awarding the United States the full amount of its claim for the FYIR,[8] and that recommendation was adopted by the Court in its 1963 decision (373 U.S. at 595-601) and the 1964 Decree. 376 U.S. at 344. The decree reserved no boundary issues on the Reservation for possible future determination, as it did with respect to the Fort Mojave and Colorado River reservations. 376 U.S. at 344-45.

C. The 1979 Supplemental Decree (*Arizona v. California*, 439 U.S. 419 (1979))

Article II(d)(5) of the 1964 Decree required the parties to furnish the Court a list of present perfected rights.[9] The State Parties and the United States subsequently engaged in extensive negotiations extending into the mid-1970's regarding the extent

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[8]Report of Special Master Simon H. Rifkind (December 5, 1960) at 268-69.

[9]A perfected right was defined as:

> ". . . a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use."

376 U.S. 340, 341 (1964).

Present perfected rights were defined as:

> "perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." *Id.*

and priorities of such rights, which resulted in a stalemate described to the Court by the State Parties in 1977 as follows:[10]

> In response to the United States' concern and request, the concerned State parties agreed to subordinate all their major present perfected rights regardless of priority date to those of the Indian tribes. The Indian rights to be so advantaged were to include not only those already decreed by this Court, *but also such additional present perfected rights as were thereafter established by decree or future stipulation that were based upon orders of the Secretary of the Interior enlarging boundaries of the Indian reservations listed in Article II(D) of the Decree in this case that had occurred since the date of said Decree and prior to submission of the stipulation.* A new stipulation was drafted by the concerned State parties which those parties believed would satisfy all of the conditions of the United States. *The United States then demanded the further condition that all parties would agree to additional quantified Indian water rights based on said boundary enlargements whether or not said secretarial orders proved to be legally valid.*
>
> *The concerned State parties rejected this additional demand. . . .*

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[10]Joint Motion for a Determination of Present Perfected Rights and the Entry of a Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental Decree (April 29, 1977, May 2, 1977) at 24 (emphasis added, footnote omitted).

The United States proposed the following language regarding adjustments to present perfected rights for Indian reservations resulting from final boundary determinations:[11]

> [T]he quantities fixed in paragraphs (1) through (5) of Article II(D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court *in the event that the boundaries of the respective reservations are finally determined.*

The State Parties agreed to the United States' proposed boundary language and it was included in a joint motion for entry of a stipulated supplemental decree filed by all parties,[12] which the Court entered on January 9, 1979 ("1979 Decree"). 439 U.S. 419, 421 (1979).

D. The Proceedings Before the Secretary of the Interior Regarding the Disputed FYIR Boundary Lands[13]

In 1968, while the present perfected rights negotiations were going on, Solicitor Weinberg affirmed the Margold Opinion, noting the Tribe's action for compensation pending

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[11]Response of the United States to the Joint Motion for a Determination of Present Perfected Rights and Entry of a Supplemental Decree (November 1977) at 2-3 (emphasis added).

[12]Joint Motion for the Entry of a Supplemental Decree; Proposed Supplemental Decree; and Memorandum in Support of Proposed Supplemental Decree (May 26, 1978) at 5.

[13]The history of the proceedings before the Secretary through June 24, 1976 is set out in *Quechan Hearings*, n. 4 *supra*.

before the Indian Claims Commission.[14] The Tribe subsequently petitioned the Secretary to reverse the Margold Opinion, and a draft Solicitor's opinion that would have done so was near approval when the State Parties learned of it and were granted the opportunity to review and comment on it. After extensive briefing and two days of oral argument before Secretary Kleppe and Solicitor Austin, Solicitor Austin informed the Tribe by letter of February 2, 1976 that he found no basis to overturn the Margold Opinion[15] and subsequently prepared a formal opinion affirming that opinion (n. 2 *supra*).

With the advent of the Carter Administration, the Tribe requested Secretary Andrus to review the dispute. On December 20, 1978, without giving the State Parties an opportunity to be heard again, Solicitor Krulitz issued an opinion reversing the Austin Opinion and holding that the Tribe's cession of its lands under the 1893 Agreement had never become effective because the conditions in the Agreement had not occurred. 86 I.D. 3. That same day Secretary Andrus issued an order revising the boundaries of the FYIR to reflect the rationale of the Krulitz Opinion.[16]

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[14]Memorandum from the Solicitor to the Secretary of the Interior (June 12, 1968) quoted in *Quechan Hearings*, n. 4 *supra* at 68.

[15]*Quechan Hearings, n. 4 supra* at 124.

[16]See *Arizona II*, 460 U.S. at 632-633; *see also Quechan Indian Reservation Boundaries; Secretarial Determination and Directives*, 46 *Fed. Reg.* 11372 (1981).

E. The Proceedings in *Arizona II* (*Arizona v. California*, 460 U.S. 605 (1983), 466 U.S. 144 (1984) (Decree))

On December 22, 1978 the United States moved to modify the 1964 Decree to obtain water rights for certain Indian "omitted" and "boundary" lands.[17] Acknowledging that Article II(D)(5) only provided for subsequent adjustment as a result of final boundary determinations on the Colorado River and Fort Mojave reservations, the United States argued that "fundamental equitable principles require that the same rule apply to the other Reservations whose boundaries likewise have been finally determined to include acreage *not known to be encompassed in 1964*" and that this principle "appears to be agreed on all sides and is, indeed, expressly contemplated by the Supplemental Decree proposed by the State Parties." *Id.* at 12 (emphasis added). Consequently, it sought to increase the FYIR's allocation to provide additional water for the practicably irrigable lands added by Secretary Andrus' order. The State Parties responded that there had been no final determination of any of the various boundary disputes and asked the Court to address them.[18]

The matter was referred to Special Master Elbert P. Tuttle, whose final report concluded that the boundaries of the Fort Mojave, Colorado River and Fort Yuma reservations had

[17]Motion of the United States for Modification of Decree and Supporting Memorandum (December, 1978) at 6. The United States sought water for "boundary lands" for which water had not been allocated in the original proceeding and for "omitted lands" that had not been considered to be practicably irrigable in the original proceeding.

[18]Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree (February 14, 1979) at 22-25.

been "finally determined" and declined to review the validity of those determinations.[19]

The Court rejected Special Master Tuttle's acceptance of the Secretarial orders on the Fort Mojave, Colorado River and Fort Yuma reservations as final determinations, but did accept several post-1964 court decrees and an act of Congress affecting the Fort Mojave and Cocopah reservations as final determinations. *Arizona v. California*, 460 U.S. 605, 636, 640-41 (1983). The Court's decision explained the effect of the 1979 Decree as follows (*id.* at 634 (emphasis added)):

> Our Supplemental Decree of 1979 did not . . . resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for *possible* adjustments with respect to the Colorado River and Fort Mojave Reservations, but *it also left open the issues about the boundaries of the other reservations.*
> . . .

The 1984 Supplemental Decree revised Article II(D)(5) as follows (466 U.S. 144, 145, emphasis added):

> [T]he quantities fixed in this paragraph [Fort Mojave] and in paragraphs 1 [Chemehuevi], 2 [Cocopah], 3 [Fort Yuma], and 4 [Colorado River] shall be subject to appropriate adjustments by agreement or decree of this Court *in the event that the boundaries of the respective reservations are finally determined.*

[19]Report of Special Master Elbert P. Tuttle (February 22, 1982) at 55.

F. The Current Proceedings ("*Arizona III*")

The State Parties' July 19, 1989 motion to reopen the decree to determine the disputed boundaries on the Fort Mojave, Colorado River and Fort Yuma reservations specifically raised the Fort Yuma preclusion issue for the first time before this Court.[20] Although the State Parties had not asserted a preclusion defense against the Quechan claim in *Arizona II*, the propriety of that defense had been made clear by the Court's "omitted lands" decision in *Arizona II* and the Court's subsequent enunciation of the preclusive effect of water decrees on unasserted Indian water rights in *Nevada v. United States*, 463 U.S. 110, 129-130 (1983). The United States and the Tribes did not oppose the motion, but the Tribes disputed the State Parties' suggestion that the Fort Yuma claim might be barred by *res judicata*:[21]

> There is no *res judicata* bar with respect to the Fort Yuma (Quechan) boundary. This Court's 1979 Supplemental Decree - to which the State Parties agreed - expressly provided that the water allocations for use on all the Reservations, including those for the Fort Yuma Reservation, are subject to adjustment "in the event that the boundaries of the respective

[20]Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations and Supporting Memorandum (July 19, 1989) at 1-2.

[21]Response of the Tribes to the Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations (September 1, 1989) at 3-4 (footnote omitted).

> reservations are finally determined." 439 U.S. at 421.

Before Special Master Frank McGarr the State Parties contended that the water claim for the disputed boundary lands was precluded by (1) the finality principles applied to "omitted lands" in *Arizona II* and (2) a 1983 Claims Court judgment on the Tribe's long pending claim against the United States for compensation based on the 1893 agreement (page 6 *supra*). The United States and the Tribe claimed that, whether or not the preclusion principles of *Arizona II* would otherwise apply to the failure of the United States to assert a claim for water for the disputed lands in *Arizona I*, the State Parties had waived that defense by (1) entering into the stipulated 1979 Supplemental Decree and (2) failing to assert it in *Arizona II*.

The State Parties responded that (1) the stipulated decree language only maintained the unresolved status of the boundary disputes on all five reservations, leaving their ultimate resolution, as well as any appropriate modifications of the 1964 water allocations, for another day and (2) their preclusion defense was not untimely.

The Special Master rejected the United States' and the Tribe's contentions that the State Parties' "finality principles" argument had been waived or was untimely, but nevertheless did not accept it, concluding that the Government could not have foreseen in *Arizona I* that the Margold Opinion would be overturned 40 years later:[22]

[22]Memorandum Opinion and Order No. 4 (September 6, 1991) at 6-7 (emphasis added).

The United States made no water rights claims in the 1964 decree because the United States necessarily relied on the 1935 [sic] Secretary of the Interior opinion, the decree that all Fort Yuma boundary lands had been ceded by the Quechan Tribe to the United States, which action foreclosed such claims and thus foreclosed any possibility that the United States, as trustee for the Quechan Tribe, could assert water rights claims on behalf of the Tribe, based on claimed Fort Yuma boundary lands. It had no other option. But it is clear that *the later Secretary of the Interior opinion arbitrarily changing this decision was a circumstance not known in 1964, thus constituting an exception to the application of the rule of res judicata.*

Characterizing it as a "close question," the Special Master held that:

> [t]he Tribe is not precluded from asserting water rights based on boundary land claims on [sic] this proceeding, because although the U.S. on behalf of the Tribe failed to assert such claims in the proceeding leading to the 1964 decree, a later and then unknown circumstance bars the application of the doctrine of *res judicata* to this issue.

III. ARGUMENT

A. The Court's Preclusion Rationale Concerning "Omitted Lands" in *Arizona II* is Equally Applicable to the FYIR "Boundary Lands" Claim

In *Arizona II* the Court rejected the Government's claims for water rights for "omitted lands" which allegedly were "practicably irrigable" at the time of *Arizona I*, but for which the Government intentionally chose not to seek water rights. It emphasized that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States" and "the strong interest in finality in this case." 460 U.S. at 620. It also recognized that not only did non-Indian water users in California and Arizona "predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, an enlargement of the Tribes' allocation cannot help but exacerbate potential water shortage problems for these projects and their states."[23]

Against that background, the Court held that although "the technical rules of preclusion are not strictly applicable . . . [because they] do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment . . . the principles upon which these rules are founded should inform our decision," which it summarized as follows: "[A] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Id.* at 619. Inasmuch as the 1964 Decree settled "the extent of

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[23] *Id.* at 621. Later that term the Court stressed that the "policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water [citing *Arizona II*]." *Nevada v. United States*, 463 U.S. 110, 129 n. 10 (1983).

irrigable acreage within the uncontested boundaries of the reservations," the Court refused to reconsider issues that were ". . . fully and fairly litigated 20 years ago." *Id.* at 621. It also found that the Quechan and other Indian tribes were bound by the United States' representation of them in *Arizona I*. *Id.* at 626-27.

The principles that underlie the Court's "omitted lands" decision should also guide its decision on the FYIR "boundary lands" claim. Those principles preclude the consideration of *claims* that were *or could have been raised* in the earlier *Arizona I* proceeding. *Nevada v. United States*, 463 U.S. at 129-30. The boundaries of the FYIR had been administratively determined by the Secretary's approval of the Margold Opinion in 1936, presumably recognized as a "final determination" by the Tribe in light of its action seeking compensation before the Indian Claims Commission in 1951, adopted by the United States in presenting its water claim for the FYIR in *Arizona I*, and formed the basis for this Court's 1964 Decree. There is no question that, *based on known facts at the time*, the United States could have raised the FYIR "boundary lands" claim in *Arizona I*, as it did for the Fort Mojave and Colorado River reservations, but made a deliberate decision not to do so, just as it did with respect to the "omitted lands." Furthermore, the same representations that the United States made to Special Master Rifkind concerning the limits of its claims for the practicably irrigable acreage on each reservation (pages 7-9 *supra*), as to which the Court in *Arizona II* made particular reference (460 U.S. at 622 note 14), should also be read as a limitation on its claims as to the boundaries of each reservation. The dominant purpose underlying the Court's decision to avoid an open-ended decree with respect to Indian rights would plainly be frustrated if the United States could escape the finality of that litigation by Secretarial reversal of the 1936 Margold Opinion 40 years later based on a new legal theory.

B. The State Parties Did Not Waive Their Right to Raise a Preclusion Defense

1. The 1979 Supplemental Decree

The 1979 decree provided as follows (439 U.S. 419, 421, emphasis added):

> [T]he quantities fixed in paragraphs (1) through (5) of Article II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court *in the event* that the boundaries of the respective reservations are finally determined.

Nothing in Article II(D)(5) assumed that there would necessarily be a "final determination" of any of the disputed reservation boundaries, as the conditional "in the event" language makes clear. The State Parties' argument that Article II(D)(5) simply preserved the status quo regarding possible boundary disputes is consistent with the Court's interpretation of that article in *Arizona II* (460 U.S. at 634 (emphasis added)):

> Our Supplemental Decree of 1979 did not . . . resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for *possible* adjustments with respect to the Colorado River and Fort Mojave Reservations, but *it also left open the issues about the boundaries of the other reservations* . . . .

The Court's interpretation of the 1964 Decree, as amended by stipulation in 1979, recognized the lack of any certainty that the boundary disputes would necessarily *ever* be finally

determined, or, if any were, that such determinations would entitle a tribe to an automatic increase in its 1964 water allocation. Article II(D)(5) cannot be read as a waiver by the State Parties of any defenses they might assert in any of those boundary disputes, including the preclusion defense asserted here, especially in light of their earlier rejection of a Government proposal that they waive *all* defenses (pages 11-12 *supra*).

2. The background of the 1984 Supplemental Decree in *Arizona II* confirms the State Parties' construction of the 1979 Decree

The controversy between the United States and the State Parties over the framing of the decree to implement the Court's decision in *Arizona II* confirms our contention that the boundary language in the 1979 Decree was intended to be completely neutral as to the effect of any "possible" future "final determinations" of boundary disputes or "appropriate adjustments" to the water allocations in the 1964 Decree. Unlike the 1964 and 1979 decrees, which were stipulated, the 1984 Decree was vigorously contested both as to substance and form. The State Parties' proposed decree addressing boundary disputes was described to the Court as follows:[24]

> Except as expressly provided, it does not modify or amend those [1964 and 1979] decrees, nor does it attempt to provide how any boundary adjustments that may result from any future final determinations of disputed

[24]Proposed Decree of the State Parties and Motion for Comment Period (1983) at 1.

> boundaries may be reflected in those decrees.

The United States, on the other hand, argued that the "appropriate adjustment" language of the 1964 and 1979 decrees contemplated only "upward adjustments."[25] The State Parties forcefully resisted that "heads I win, tails you lose" proposal:[26]

> Now that the United States and the Tribes have reopened the question of proper boundaries, the State Parties must be allowed to assert *all of their claims and defenses as to those boundaries*.
>
> * * *
>
> The proposed Decree of the United States goes far beyond implementing this Court's opinion of March 30, 1983. It seriously distorts that opinion and attempts to usurp the State Parties' rights to litigate issues which have not yet been adjudicated. . . . In contrast, the proposed decree of the State Parties sets forth provisions which encompass only those issues actually ruled upon by the Court. *It appropriately leaves other important issues to a later date when they have been appropriately framed by boundary litigation elsewhere.*

[25]Decree Proposed by the United States and Memorandum in Support Thereof (September 1983) at 3-6.

[26]Comments on the Decree Proposed by the United States and Revised Decree Proposed by the State Parties 4 (November 10, 1983) at 4, 10 (emphasis added).

On February 23, 1984 the Clerk of the Court sent the parties a proposed Supplemental Decree, informing them that it "follows the style suggested by the United States but on matters of substance resolves differences in favor of the State Parties" and requesting their comments "as to form." The United States nevertheless submitted comments urging the Court to reconsider its decision to reject the United States' substantive proposals.[27] The Court declined to do so and treated the unresolved boundary questions in its decree of April 16, 1984 as follows (466 U.S. 144, 145):

> [T]he quantities fixed in this paragraph [Fort Mojave], and in paragraphs 1, 2, 3, and 4 [the other four reservations] shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Article D of the decree also provided that "except as otherwise provided herein," the 1964 and 1979 decrees remained "in full force and effect." *Id.* at 146.

C. The State Parties' Preclusion Defense is Not Untimely

The Federal Rules of Civil Procedure "may be taken as guides" in original actions in this Court. S.Ct. Rule 17. FRCP Rules 8(c), 12(b) and 15 provide that *res judicata* is an affirmative defense that should be raised in an answer or amendments thereto or is waived. Although the State Parties

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[27]Memorandum for the United States Respecting the Court's Proposed Supplemental Decree (March 1984).

did not raise a preclusion defense in their opposition to the United States' and the Tribe's 1978 motion to open the 1964 Decree, this Court could have done so *sua sponte*, inasmuch as a number of federal circuits have affirmed decisions where a preclusion defense was raised and sustained *sua sponte* by the trial court, a practice this Court has referred to with approval. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995); see also *Nixon v. United States*, 978 F.2d 1269, 1297 (D.C. Cir. 1992) (concurring opinion). Even if the Court's review of Special Master Tuttle's report in *Arizona II* could somehow be viewed as an "appellate proceeding," a number of circuits have also held it permissible for an appellate court to raise a preclusion defense *sua sponte* for the first time on appeal. See *Nixon*, *supra*, and cases cited; *Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993); *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 329 (9th Cir. 1995). The rationale for this rule is articulated in *Lesher v. Lavrich*, 784 F.2d 193 (6th Cir. 1986), in which the Sixth Circuit aligned itself with those circuits which "regard the desirability of avoiding duplicative litigation as sufficiently compelling to permit the court to raise the defense *sua sponte*." *Id.* at 195 (citations omitted); *see also Lujan v. U.S. Dep't of the Interior*, 673 F.2d 1165 (10th Cir.), *cert. den.*, 459 U.S. 969 (1982), *reh'g den.*, 459 U.S. 1229 (1983).

The decisive factors should be (1) whether the United States and the Tribe had a full and fair opportunity to litigate the preclusion issue before Special Master McGarr,[28] which they did, and (2) whether the State Parties' failure to raise it in *Arizona II* somehow prejudiced the Tribe, which it didn't.

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[28]"The purpose of [FRCP 8(c)] is to give the opposing party notice of the plea of [*res judicata*] and a chance to argue, if he can, why [its] imposition would be inappropriate." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971).

Neither the United States nor the Tribe, to the best of the State Parties' knowledge, have subsequently relied to their detriment in any way on the State Parties' failure to raise the preclusion defense in *Arizona II*. Moreover, this Court's decision in *Arizona II* rejecting the "omitted lands" claims on finality principles should have put them on notice as to the possible application of those principles to the similarly belated "boundary lands" claim. Finally, again to the best of the State Parties' knowledge, neither the Tribe or the United States have made any expenditures for irrigation facilities on the disputed boundary lands in anticipation of a successful outcome in any ultimate judicial proceedings that might resolve the dispute.

D. The Special Master Erred in Treating the 1978 Solicitor's Opinion as an Unforeseeable "Unknown Circumstance" Negating a Preclusion Defense

The Special Master's rejection of the State Parties' argument was premised on the exception to the application of the *res judicata* bar for claims premised on "new facts" that were either not in existence or reasonably ascertainable at the time of the earlier decision.[29] But his treatment of the 1978 Krulitz Opinion as the same as the post-1964 legislation and judicial decisions which led the Court in 1983 to award additional water rights for lands added to the Fort Mojave and Cocopah reservations pursuant to the 1979 Decree is misplaced. Those boundary changes were clearly based on legislative and judicial resolution of *post-1964* disputes outside the control of the Secretary which the Justice Department could have had no reasonable basis to anticipate at the time of trial in *Arizona I*. Consequently, those additions could reasonably be classified as

[29]*See, generally, Moore's Federal Practice* (3rd Ed. 1998) at ¶ 131.21[1].

"acreage not known to be encompassed in 1964," which is the way the United States described the boundary changes to which amended Article II(D) related (page 14 *supra*).

In sharp contrast, the FYIR boundary dispute originally surfaced in 1935, was resolved in 1936, and was well known to the United States in *Arizona I*, but the Secretary made no attempt to reverse his predecessor's decision and claim that the disputed lands were part of the FYIR, as he did with respect to the Fort Mojave and Colorado River Reservation boundaries. None of the facts relating to the proper boundary changed after *Arizona I*. The only post-1964 "changed circumstance" regarding the FYIR dispute was the Solicitor's reversal of the opinions of three of his predecessors as to the legal interpretation of the 1893 Agreement and 1894 Act and the substitution of a previously rejected legal theory. But it is hornbook law that a "different legal theory with [the] same factual basis will usually be barred."[30] It would make *res judicata* and similar "finality principles" meaningless if a subsequent change of mind by a party seeking to avoid an otherwise applicable preclusion bar could qualify as an "unknown circumstance." The Court should reject that concept.

IV. CONCLUSION

The Special Master was presented with two independent grounds for precluding assertion by the United States and the Tribe of a claim for reserved water rights for the FYIR disputed

[30]Id. at ¶ 131.21[3][a]; *accord*: Wright, Miller & Cooper, *Federal Practice and Procedure* (1981) at §4407 (p. 63) ("a mere change in legal theory does not create a new cause of action"); *Armstrong v. Norwest Bank*, 964 F.2d 797, 802 (8th Cir. 1992) (a new theory or body of law does not establish a new claim if both actions are based on the same nucleus of operative facts).

boundary lands: (1) the "finality principles" applied by the Court in *Arizona II* and (2) the extinguishment of any tribal interest in the disputed boundary lands by the $15 million 1983 Claims Court judgment.

The arguments set forth above demonstrate that the "finality principles" applied in *Arizona II* are equally applicable to the FYIR claim, contrary to the Special Master's conclusion, and the claim should be rejected. The State Parties will present their arguments in support of the Special Master's decision regarding the preclusive effect of the Claims Court judgment in their brief opposing the anticipated exceptions to that decision by the United States and the Tribe.

Respectfully submitted,

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